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**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Order of the Department of
Natural Resources for Drawdown and Plan
Submittal for an Allegedly Unsafe Dam Owned by
James A. Brush, Located on an Unnamed
Tributary to Beaver Creek, Trempealeau County,
Wisconsin

Case No. 3-WC-90-903

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Department of Natural Resources West-Central Region and Dam Safety and Floodplain Management staff allege that a dam located on an unnamed tributary to Beaver Creek in Trempealeau County and owned by James Brush has been raised and maintained without submitting plans and engineering specifications to the Department and without obtaining approval from the Department in violation of secs. 31.05, 31.12 and 31.13, Stats. On March 21, 1991, the Department issued an order requiring Mr. Brush to drawdown the impoundment held by the dam to the level prior to the raising of the dam and to comply with the requirements of chapter 31, Stats.

The Department further alleges that the raising of this dam and its continued existence without proper engineering constitutes a threat to public health and welfare by posing an imminent danger to life, health and property to persons located downstream of the subject dam in violation of secs. 31.02, 31.05, 31.12, 31.13, 31.18 and 31.19, Stats. and constitutes a public nuisance pursuant to sec. 31.25, Stats.

A request for a contested case hearing was received and granted by the Department of Natural Resources. On January 21, 1998, the Department filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice, a hearing was held on April 9, 1998, in La Crosse, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed written argument after the hearing. The last brief was filed on May 4, 1998.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Dan Graff, Attorney
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Madison, Wisconsin 53707-7921

James A Brush, by

Thomas L. Horvath, Attorney
Hale, Skemp, Hanson, Skemp & Sleik
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FINDINGS OF FACT

1. The dam which is the subject of this hearing is located on an unnamed tributary to Beaver Creek, in the SE ¼, NW ¼ of Section 8, Township 19 North, Range 8 West, Trempealeau County. The dam originally had a structural height of 23 feet, a storage capacity of 44 acre-feet and the reservoir had a surface area of approximately 2.3 acres. The dam consisted of an earthen embankment with a drop inlet riser control structure with a drawdown valve and a grassed emergency spillway. The dam was constructed in 1970 by the Soil Conservation Service in cooperation with the two adjoining landowners at the time. The purpose of the dam was flood control. The Department of Natural Resources (Department) approved the plans for the dam (exh. 15).

2. James Brush purchased the property surrounding the dam and impoundment in 1989. In 1990, Mr. Brush enlarged the size of the dam and increased the size of the impoundment behind the dam. Four feet of fill was added to the crest of the dam and 7.7 feet was added to the riser. The dam, after enlargement, has a structural height of 27 feet, a storage capacity of 80 acre-feet and a surface area of approximately 4.5 acres. The plans for the enlargement of the dam were not approved by the Department.

3. In response to a complaint, Tim Babros, a Department employee, visited the site on September 17, 1990. At the time of the visit work on enlarging the dam was occurring. On October 12, 1990, a follow up meeting with Mr. Brush was held at the site. At the October 12th meeting Mr. Brush was instructed not to proceed any further with the project until the Department had approved the project.

4. On March 21, 1991, the Department issued an Order for Dam Drawdown and Plan Submittal to Mr. Brush. The order found that the "dam in its present condition is of unknown structural stability and hydraulic capacity and may be dangerous to life, health and

property." The order required Mr. Brush to draw down the water level in the impoundment to the authorized level until the Department authorized the enlargement of the dam. Mr. Brush requested a contested case hearing to review the order.

5. Mr. Brush hired Envirosystems Consulting Group to prepare an Environmental Assessment of the enlarged dam. The Environmental Assessment (exh. 6) was submitted to the Department in October, 1991. The Environmental Assessment does not satisfy the plan requirements of chapter 31, Stats., and chapter NR 333, Wis. Adm. Code.

6. The dam discharges into an unnamed tributary to Beaver Creek. The portion of Beaver Creek that the unnamed tributary discharges into has been identified by the Department as being capable of supporting "trophy-sized" brook and brown trout. Without proper design, the dam will negatively impact this portion of Beaver Creek as trout habitat by increasing the temperature of the water and reducing the amount of dissolved oxygen in the water which is discharged into the unnamed tributary of Beaver Creek.

7. At the time the Department approved the plans for the original dam, the unnamed tributary to Beaver creek was found to be an intermittent, non-navigable stream. However, in 1990, using the definition of navigability from the Wisconsin Supreme Court decision in DeGaynor and Company, Inc., v. Department of Natural Resources, 70 Wis. 2d 936 (1975), the Department staff determined the unnamed tributary to Beaver Creek across which the dam is located is navigable because it has a stream bed and bank as well as high water marks, indicating sufficient water depths to allow navigation.

8. On October 11, 1996, the Department's Assistant State Dam Safety Engineer inspected the subject dam. Based on this inspection, a dam safety inspection report was issued on April 14, 1997. According to the report, the dam at the time of the inspection had "less principal and less emergency spillway capacity and is less stable than the originally designed structure." The dam in its present condition may be dangerous to life, health and property.

9. The dam as altered is considered a large dam pursuant to sec. 31.19(1), Stats.

Discussion

James Brush does not dispute that he has not received Department approval for the enlargement of the dam nor does he argue that the Environmental Assessment prepared by Envirosystems Consulting Group satisfies the requirements of chapter 31, Stats., and chapter NR 333, Wis. Adm. Code. Mr. Brush argues that the stream across which the dam is constructed is not navigable and that the Department has no jurisdiction over this dam. The Department staff concluded that the stream across which the dam was constructed is navigable. The testimony offered in support of this conclusion was stale and the copies of photographs of the stream that were submitted were impossible to interpret. The Department has the burden to prove that the stream is navigable. Based on the evidence in the record, it is difficult to make a determination regarding the navigability of the stream. Nevertheless the Department has jurisdiction over this dam regardless of whether the stream is navigable. Therefore, a finding on this issue is not necessary.

As support for his argument that the Department does not have jurisdiction over dams erected across non-navigable streams, Mr. Brush cites sec. 31.31, Stats. Sec. 31.31, Stats, provides:

Any person may erect and maintain upon that person's land, and, with the consent of the owner, upon the land of another, a water mill and a dam to raise water for working it upon and across any stream that is not navigable in fact for any purpose whatsoever upon the terms and conditions and subject to the regulations hereinafter expressed; and every municipality may exercise the same rights upon and across such streams that they may exercise upon or across streams navigable for any purpose whatsoever.

Although sec. 31.31, Stats., does provide that a person may erect and maintain a dam across a stream that is not navigable, the authority to do so is "subject to the regulations hereinafter expressed." Sec. 31.33, Stats., is directly on point. Sec. 31.33, Stats., titled "Jurisdiction of department," provides in relevant part:

. . . all dams heretofore or hereafter erected or constructed on streams not navigable in fact for any purpose, shall be subject to and regulated and controlled, so far as applicable, by ss. 31.02, 31.12, 31.18, 31.19, 31.25, 31.26 and 196.665 . . .

The Wisconsin Supreme Court has made reference to the authority of state agencies to regulate dams across non-navigable streams. The references indicate that there is no ambiguity regarding the legislative intent underlying sec. 31.33, Stats. For example, In Muench v. Public Service Comm., 261 Wis. 492 53, N.W.2d 514 (1952), the court stated:

The nature of "these other public rights" referred to in sec. 31.06(3), Stats., is elucidated in the opinion of this court in Nekoosa-Edwards Paper Co. v. Railroad Comm. (1930), 201 Wis. 40, 46, 228 N.W. 144, 229 N.W. 631. That case involved a review of an order of the Railroad Commission denying the plaintiff company a permit or license to maintain a dam on Four Mile creek, a stream flowing into the Wisconsin river. Application for the permit was made under secs. 31.31 to 31.33 (the Milldam Act), which applies to streams "not navigable for any purpose." The license was denied for the reason that the commission found that the stream was navigable and that such a dam must be authorized pursuant to secs. 31.05 to 31.09.

261 Wis. 492 53, at 507.

The Department has promulgated chapter NR 333, Wis. Adm. Code, under its authority pursuant to chapter 31, Stats. Sec. NR 333.01, Wis. Adm. Code, provides:

The purpose of this chapter is to ensure that dams are designed, constructed and reconstructed so as to minimize the danger to life, health and property. This chapter is adopted pursuant to ss. 31.02 (2), 31.19 and 31.33, Stats.

Sec. NR 333.02, Wis. Adm. Code, lists the types of dams to which the provisions of chapter NR 333, Wis. Adm. Code, do not apply. The subject dam clearly does not fall within any of the categories of dams to which the chapter does not apply. The Department has jurisdiction over the subject dam regardless of whether the stream across which is erected it is navigable.

Finally, Mr. Brush argues that even if the Department has jurisdiction over the his dam pursuant to sec. 31.33, Stats., he did not need Department approval to enlarge the size of the dam. Sec. 31.13, Stats., requires owners of existing dams to obtain permission from the Department prior to raising or enlarging the size of the dam. Sec. 31.33, Stats., includes a list of statutes which apply to dams across non-navigable streams. Sec. 31.13, Stats., is not included in this list. Even though sec. 31.13, Stats., is omitted from this list, it is clear that this statute applies to dams erected across non-navigable streams. Sec. 31.33(2), Stats., provides that with respect to dams across non-navigable streams the Department shall issue licenses, as opposed to permits which are issued for dams across navigable waterways. Sec. 31.13(1), Stats., provides that permission under this statute shall be "in amendment of any existing franchise, *license*, or permit granted authorizing the construction or maintenance of such dam" (emphasis added).

Alternatively, because the stream across which the dam is constructed is connected to a navigable waterway, Beaver Creek, the Department would have authority to issue its March 21, 1991 order solely on the basis of its responsibility to protect navigable waters as set forth in sec. 31.02, Stats.

CONCLUSIONS OF LAW

1. Pursuant to sec. 31.33, the Department has jurisdiction over dams erected across non-navigable streams.
2. The subject dam as in its current configuration is a large dam pursuant to sec. 31.19(1), Stats., and; therefore, is subject to the requirements of chapter NR 333, Wis. Adm. Code.
3. The Department has authority pursuant to secs. 31.02 and 31.19, Wis. Stats., to inspect or cause an inspection to be made of any dam or reservoir.
4. The Department has authority pursuant to secs. 31.02 and 31.19, Stats., to order alterations and repairs to any dam that is not sufficiently strong or is unsafe, and that is dangerous to life, health and property.
5. The Department has authority pursuant to sec. 31.12, Stats., to require plan approval for dam alterations prior to commencement of construction activities.
6. The Department has authority pursuant to sec. 31.13, Stats., to require that an order be issued prior to any substantial alteration or addition of any dam.

7. The Department has authority pursuant to secs. 31.02 and 31.19, Stats., to order the draw down of the impoundment above a dam that is not sufficiently strong or is unsafe, and that is dangerous to life, health, and property.

8. The Division of Hearings and Appeals has the authority to issue the following order.

ORDER

It is therefore ordered that:

1. Starting immediately, the James Brush shall draw down the impoundment held by the dam to the pre-existing level, remove the riser extension, and shall not raise the impoundment level until a permit is issued for the dam modifications. The draw down shall be accomplished in such a manner as to not cause flooding downstream and shall not exceed a rate of one foot per day.

2. James Brush shall apply for a permit or license pursuant to sec. 31.13 Stats., to raise or enlarge the dam .

3. James Brush shall alter the structure in accordance with Department approved plans and specifications.

4. In lieu of provisions 2 and 3 of this order James Brush shall restore the outlet structure and embankment to the dimensions of the June 1, 1970, approved plans and seed and mulch all disturbed areas by April 1, 1999.

5. In lieu of provisions 2 and 3 or 4 of this order James Brush shall submit a plan to abandon the dam pursuant to secs. 31.02 and 31.18, Stats., by November 1, 1998.

Dated at Madison, Wisconsin on July 17, 1998.

STATE OF WISCONSIN
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By: _____

Mark Kaiser
MARK J. KAISER

ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs 227.52 and 227.53, Stats

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec 227.49, Stats. Rehearing may only be granted for those reasons set out in sec 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements